Supreme Court, U.S.
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NO. 90-1542

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

BARTHOLOMEW RIVIECCIO,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.

PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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PETITIONER'S REPLY TO THE BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

This case presents the vital question whether an indictment derived from testimony given by a defendant under a grant of immunity is valid. The Second Circuit has held that it is because Kastigar v. United States, 406 U.S. 441 (1972), and the Fifth Amendment protect a defendant only from the use of his immunized testimony at his trial.

The Solicitor General has conceded that the Second Circuit's decision conflicts with reported decisions of the District of Columbia, Seventh, Eighth, Tenth and Eleventh Circuits, all of which have recognized that a defendant's indictment is subject to dismissal if the indictment is based

on, or derived from, testimony given by the defendant under a grant of immunity. See Brief for the United States in Opposition at 9, 12-13. On this basis alone, the case undoubtedly merits consideration by this Court on certiorari. See Rule 17.1(a) of the Rules of the Supreme Court.

The government opposes the grant of certiorari, arguing primarily that proper resolution of Petitioner's case does not necessarily turn on the issue whether the government may use an immunized witness's immunized testimony to secure an indictment against him. We are prepared to argue, on the merits, that the government is wrong. But for purposes of certiorari, it does not matter. The law today in the Second Circuit is that a defendant may be indicted on the basis of testimony which he gave under an immunity grant.

The Second Circuit's published opinion says that the Fifth Amendment, 18 U.S.C. §6002, and Kastigar v. United States, 406 U.S. 441 (1972), protect a defendant only from the use of immunized, compelled testimony at trial. (A.10-11)

Even if there were no conflict in the Circuits on this issue, the case would merit consideration on certiorari, because the Court of Appeals' ruling is in apparent conflict with Kastigar v. United States, 406 U.S. 441 (1972); Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); and Counselman v. Hitchcock, 142 U.S. 547 (1892), decisions which the government does not even bother to discuss.

In addition, the case merits consideration by this Court based on the serious impact the Second Circuit's ruling will have on prosecutors -- both

state and federal -- and on the criminal defense bar. The government argues that the Second Circuit did not authorize prosecutors to use immunized testimony to secure an indictment -- but held only that a defendant is not entitled to dismissal of the indictment where the prosecution has done just that. To the defendant, at least, there is little difference. It is the extraordinary client who would believe that, although he stands indicted based on his own testimony, he is nevertheless in "substantially the same position," Kastigar, supra, 406 U.S. at 457, he would have been in had he not testified at all.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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